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23556 7590 12/20/2010 KIMBERLY-CLARK WORLDWIDE, INC. Tara Pohlkotte 2300 Winchester Rd. NEENAH, WI 54956				
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte KIMBERLY-CLARK WORLDWIDE, INC.

Appeal 2009-010026
Application 10/750,505
Technology Center 3700

Before JAMESON LEE, SALLY GARDNER LANE, and
SALLY C. MEDLEY, *Administrative Patent Judges*.

LEE, *Administrative Patent Judge*.

DECISION ON APPEAL¹

¹ The two-month time period for filing an appeal or commencing a civil action, as recited in 37 C.F.R. § 1.304, or for filing a request for rehearing, as recited in 37 C.F.R. § 41.52, begins to run from the “MAIL DATE” (paper delivery mode) or the “NOTIFICATION DATE” (electronic delivery mode) shown on the PTOL-90A cover letter attached to this decision.

A. STATEMENT OF THE CASE

This is a decision on appeal by the real party in interest, Kimberly-Clark Worldwide, Inc. (“Kimberly-Clark”), under 35 U.S.C. § 134(a) from a final rejection of claims 1-8, 10-19, 21, 22, 35-39, 41-46, and 48. We have jurisdiction under 35 U.S.C. § 6(b). We *affirm*.

Reference Relied on by the Examiner

Japanese Patent Application No. 10-95481 from Applicant Kao Corporation published April 14, 1998 (“Kao”)

The Rejection on Appeal

The Examiner rejected claims 1-8, 10-19, 21, 22, 35-39, 41-46, and 48 under 35 U.S.C. § 103(a) as unpatentable over Kao.

The Invention

The invention relates to a method of folding disposable absorbent articles. (Spec. 1:6-8.)

Claim 1 is representative and is reproduced below (App. Br. 9 Claims App’x.):

1. A method of folding a disposable absorbent article, the article having an initial upper surface, an initial lower surface, a longitudinal centerline, a transverse centerline, opposing first longitudinal side edges, opposing first transverse end edges and an unfolded configuration, the method of folding comprising: forming one fold extending in a transverse direction by bringing a portion of the initial upper surface into a facing relationship with another portion of the initial upper surface, the one fold being spaced between opposing first transverse end edges, the resulting partially-folded article having an intermediate first surface, an intermediate second surface and

opposing second transverse end edges, and thereafter forming a number, greater than one, of transversely extending folds in an accordion-like manner, the transversely extending accordion-like folds being spaced between opposing second transverse end edges and thereby forming a folded article having a folded configuration area and an unfolded configuration area wherein the folded article has a ratio between the folded configuration area and the unfolded configuration area of no more than 0.14.

B. ISSUE

Did the Examiner incorrectly determine that the claim feature of a folded article having a ratio between a folded configuration area and an unfolded configuration area of no more than 0.14 does not distinguish Kimberly-Clark's claims over the teachings of Kao?

C. PRINCIPLES OF LAW

In an obviousness analysis, it is not necessary to find precise teachings in the prior art directed to the specific subject matter claimed because inferences and creative steps that a person of ordinary skill in the art would employ can be taken into account. *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007).

D. FINDINGS AND ANALYSIS

The Examiner rejected claims 1-8, 10-19, 21, 22, 35-39, 41-46, and 48 over Kao. Claims 1, 12, 35 and 42 are independent. Claims 2-8, 10, 11, 13-19, 21, 22, 36-39, 41, 43-46, and 48 are ultimately dependent on, and argued collectively with, one of the independent claims. Claims 1, 12, 35, and 42 are each drawn to a method of folding a disposable absorbent article. Each claim requires that the article is folded in an "accordion-like" manner (App. Br. 9, 11, 13, 14 Claims App'x.):

thereby forming a folded article having a folded configuration area and an unfolded configuration area wherein the folded article has a ratio between the folded configuration area and the unfolded configuration area of no more than 0.14.

Thus, Kimberly-Clark's claims require that the "accordion-like" folding of the absorbent article results in a ratio of folded configuration area to unfolded configuration area of no more than 0.14. As explained in Kimberly-Clark's specification, in determining the folded area to unfolded area ratio "the area or footprint of a folded disposable absorbent article is compared to the area or footprint of the unfolded disposable absorbent in its flat-out, uncontracted state[.]" (Spec. 11:15-18.)

The Examiner determined that Kao describes folding a disposable absorbent article in an "accordion-like" manner as required by Kimberly-Clark's claims. (Ans. 3:11-14.) That determination is not disputed. The Examiner further determined that Kao does not expressly disclose any particular ratio of the area of the article in its folded state to its area in an unfolded state. However, the Examiner concluded that one with ordinary skill in the art would have recognized that producing the ratio set forth in Kimberly-Clark's claims would have been obvious as merely a matter of routine in carrying out the folding techniques disclosed in Kao. (*Id.* at 3:15-4:6.)

Kimberly-Clark challenges the Examiner's conclusion, arguing that the Examiner does not explain how there might be "a reasonable expectation of success" in folding Kao's absorbent article to the state required by its claims. (App. Br. 6:19-20.) According to Kimberly-Clark, Kao's teachings are limited to a "typical, perfunctory fold" producing a folded article outside of the claimed configuration. (*Id.* at 7:11-15.)

Kimberly-Clark's argument is unpersuasive. Kimberly-Clark does not explain what constitutes a "typical, perfunctory fold" or set forth any meaningful rationale as to why Kao suggests only such a fold. Kimberly-Clark's assessment of Kao's teachings is also inaccurate and contrary to what is disclosed by the reference. Kao's invention is directed to a packaging structure for carrying a folded diaper. (Kao ¶ 0001.)² One goal of the invention is to reduce the space taken up by a diaper by rendering a diaper more "compact." (*Id.* at ¶ 0005.) As one would expect, one technique employed by Kao in furtherance of that goal is folding the diaper. Kao does not restrict its teachings to any particular type of fold. Rather, Kao describes that a diaper may be folded in a variety of ways including incorporating a "double fold," folding the diaper "to appear like a W-shape in section," and folding it to resemble a "C-shape with 3 layers after folding." (*Id.* at ¶¶ 0027-28.)

Based on Kao's teachings, one with ordinary skill in the art would have readily appreciated that Kao's diaper may be folded to reduce the area or footprint of the diaper so as to make it more compact. That Kao may not itself expressly disclose the particular ratio required is of no moment. In an obviousness analysis, it is not necessary to find precise teachings in the prior art directed to the specific subject matter claimed because inferences and creative steps that a person of ordinary skill in the art would employ can be taken into account. *KSR Int'l Co.*, 550 U.S. at 418. A person of ordinary skill in the art, who is also one of ordinary creativity and not an automaton,

² References in this opinion to paragraph numbers in Kao are to the English translation of that document which is of record and dated March 01, 2006.

Id. at 421, would have appreciated that it is intrinsic to the very nature of folding an article, such as a diaper, that the more the article is folded the less area it takes up.

Furthermore, we reject Kimberly-Clark's argument that there is no "reasonable expectation of success" in folding Kao's diaper down to the claimed ratio. Kao seeks to render a diaper more compact by folding and does not set any outer limit on the extent of folding which may take place. Kimberly-Clark's assertion is mere argument of counsel which cannot take the place of evidence lacking in the record. *Estee Lauder Inc. v. L'Oreal, S.A.*, 129 F.3d 588, 595 (Fed. Cir. 1997).

For the foregoing reasons, we sustain the rejection of claims 1-8, 10-19, 21, 22, 35-39, 41-46, and 48 as unpatentable over Kao.

E. CONCLUSION

The Examiner did not incorrectly determine that the claim feature of a folded article having a ratio between a folded configuration area and an unfolded configuration area of no more than 0.14 does not distinguish Kimberly-Clark's claims over the teachings of Kao.

F. ORDER

The rejection of claims 1-8, 10-19, 21, 22, 35-39, 41-46, and 48 under 35 U.S.C. § 103(a) as unpatentable over Kao is affirmed.

TIME PERIOD

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1) (2009).

AFFIRMED

PL/lb:

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